

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTHONY FINLEY,

Case No. 3:13-cv-00062-MMD-VPC

Petitioner,

ORDER

v.

GREG SMITH, et al.,

Respondents.

This habeas matter comes before the Court on respondents' motion to dismiss (dkt. no. 16) as well as on petitioner's successive motion for appointment of counsel (dkt. no. 27). Respondents contend, *inter alia*, that the petition, as amended, is untimely.

I. BACKGROUND

Petitioner Anthony Finley challenges his Nevada state conviction, pursuant to a guilty plea, of burglary, and his adjudication, pursuant to a stipulation in the plea agreement, as a habitual criminal. Finley was sentenced to a maximum of 228 months with minimum parole eligibility after 84 months, with 156 days sentencing credit.

In the amended guilty plea agreement, Finley stipulated to sentencing as a "small" habitual criminal under Nevada law. He acknowledged that he could be sentenced under the "small" habitual criminal statute "to a term of not less than FIVE (5) years and a maximum of TWENTY (20) years." He further acknowledged "that my sentence is to be determined by the Court within the limits prescribed by statute" and that "the Court is not obligated to accept the recommendation" of either side as to punishment. (Dkt. no. 17, Ex. 16, at 1, 2 & 3.)

1 The judgment of conviction was filed on June 4, 2010. (Dkt. no. 17, Ex. 22.)
2 Petitioner did not file a direct appeal. The time for doing so expired on Tuesday, July 6,
3 2010, following the Independence Day holiday observance.

4 More than one year later, on or after August 31, 2011, petitioner mailed a *pro se*
5 motion to correct illegal sentence to the state district court clerk for filing. It appears that
6 the motion was received by the clerk on or about September 7, 2011. However, the
7 clerk did not file the motion but instead sent the motion to counsel of record, pursuant to
8 the court's local rules. Ultimately, the matter was considered on a December 1, 2011,
9 proper person motion; and the state district court denied relief. The Supreme Court of
10 Nevada affirmed; and the remittitur issued on January 7, 2013. (Dkt. no. 17, Exhs. 25,
11 30, 49 & 51.)

12 On or about February 3, 2013, petitioner mailed the federal petition to the Clerk
13 of this Court for filing.

14 II. DISCUSSION

15 The Court reaches only the timeliness issue.

16 Under 28 U.S.C. § 2244(d)(1)(A), the federal one-year limitation period, unless
17 otherwise subject to tolling or delayed accrual, begins running after "the date on which
18 the judgment became final by the conclusion of direct review or the expiration of the
19 time for seeking such direct review." In the present case, the limitation period, unless
20 otherwise subject to tolling or delayed accrual, thus began running after the time period
21 for filing a direct appeal expired, *i.e.*, after July 6, 2010. Absent tolling or delayed
22 accrual, the one-year limitation period would expire one year later, on July 6, 2011.

23 Under 28 U.S.C. § 2244(d)(2), the limitation period is statutorily tolled during the
24 pendency of a properly filed application for state post-conviction or other collateral
25 review. Petitioner's motion to correct illegal sentence otherwise would have statutorily
26 tolled the federal limitation period. However, he did not first present the motion until on
27 or after August 31, 2011, after the one-year limitation period already had expired absent
28 further tolling.

1 The federal petition, which was constructively filed on or about February 3, 2013,
2 therefore is untimely on its face.

3 Petitioner does not present a viable basis for overcoming the untimeliness of the
4 federal petition.

5 Equitable tolling of the limitation period is appropriate only if the petitioner can
6 show that: (1) he has been pursuing his rights diligently, and (2) some extraordinary
7 circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 130 S.Ct.
8 2549, 1085 (2010). Equitable tolling is "unavailable in most cases," *Miles v. Prunty*, 187
9 F.3d 1104, 1107 (9th Cir.1999), and "the threshold necessary to trigger equitable tolling
10 is very high, lest the exceptions swallow the rule," *Miranda v. Castro*, 292 F.3d 1063,
11 1066 (9th Cir. 2002)(quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.
12 2000)). The petitioner ultimately has the burden of proof on this "extraordinary
13 exclusion." 292 F.3d at 1065. He, accordingly, must demonstrate a causal relationship
14 between the extraordinary circumstance and the lateness of his filing. *E.g.*, *Spitsyn v.*
15 *Moore*, 345 F.3d 796, 799 (9th Cir. 2003). *Accord Bryant v. Arizona Attorney General*,
16 499 F.3d 1056, 1061 (9th Cir. 2007).

17 Petitioner relies extensively on his *pro se* status as a basis for overcoming the
18 federal time bar. However, under established law, petitioner's *pro se* status does not
19 provide a basis for equitable tolling of the federal limitation period. *E.g.*, *Rasberry v.*
20 *Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006).

21 Petitioner further refers conclusorily to alleged limitations on direct physical
22 access to a prison law library. He maintains that he can access a law library only
23 through a "paging system," pursuant to which inmates send written requests to the
24 library for materials to be sent via the prison internal mail system. This Court has
25 rejected the proposition that the fact that a prison uses a paging system for law library
26 access in and of itself categorically provides a basis for equitable tolling of the federal
27 limitation period. *See, e.g.*, *Felix v. McDaniel*, 2012 WL 666742, No. 3:09-cv-00483-
28 LRH-WGC, at *5-*9 (D. Nev., Feb. 29, 2012). Nothing in petitioner's conclusory

1 response to the motion establishes that an alleged paging system constituted an
2 extraordinary circumstance that stood in his way and prevented him from filing a timely
3 federal petition on or before July 6, 2011. Petitioners in Nevada prisons with paging
4 system law library access can and do file timely federal petitions in this Court.

5 Petitioner next suggests that his petition should not be dismissed as untimely
6 because he allegedly raises federal constitutional claims. However, by definition, the
7 federal limitation period bars federal petitions presenting federal constitutional claims
8 where the petitioner fails to file the federal petition timely. State law claims are not
9 cognizable in a federal habeas petition, and the federal limitation period plainly is not
10 limited only to federal petitions presenting state law claims.

11 Petitioner's remaining argument also begs the question. Petitioner discusses at
12 length legal principles allegedly applicable to an alleged breach of a plea agreement.
13 He urges that he pled guilty in the amended plea agreement under duress when the
14 State filed an amended complaint after he allegedly had pled guilty in the justice court
15 with a lesser sentencing exposure of 2 to 15 years. He alleges that the 84 to 228 month
16 (7 to 19 year) sentence that he received was more than the legislative guidelines allow.

17 The foregoing alleged circumstances do not establish a basis for tolling and have
18 no relevance to the timeliness issue. All of the alleged circumstances would have
19 occurred prior to the June 4, 2010, judgment of conviction. All of the alleged
20 circumstances — including the terms of the first agreement that petitioner signed, the
21 terms of the second agreement that he signed, the alleged duress that he felt when
22 signing the second agreement, and the sentence that he received — would have been
23 known to petitioner prior to the June 4, 2010, judgment of conviction. None of the
24 underlying facts to which he refers occurred after judgment. None of the grounds in the
25 federal petition, as amended, are based upon facts and circumstances arising after
26 June 4, 2010.

27 Petitioner accordingly has not presented a viable basis for equitable tolling or
28 delayed accrual of the federal limitation period. He further has not sought to establish

1 actual innocence, and it does not appear that he would be able to do so.¹

2 The petition therefore will be dismissed with prejudice as untimely.

3 **III. MOTION FOR APPOINTMENT OF COUNSEL**

4 Petitioner has submitted multiple motions for appointment of counsel. See dkt
5 nos. 1-3, 12 & 27. As the Court stated in its prior denial of appointed counsel, there is
6 no constitutional right to appointment of counsel in a federal habeas matter. The Court
7 found that the claims and issues in this case were not especially complex and that
8 petitioner had demonstrated an adequate ability to articulate his position in proper
9 person. See dkt. no. 13. Nothing in the third boilerplate form motion filed recently leads
10 to a contrary finding. The use of a paging system for law library access does not provide
11 a basis for appointment of federal habeas counsel standing alone. See, e.g., *Felix*,
12 *supra*.

13 **IV. CONCLUSION**

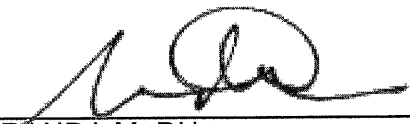
14 It is therefore ordered that respondents' motion to dismiss (dkt. no. 16) is
15 granted and that the petition shall be dismissed with prejudice as untimely.

16 It is further ordered that petitioner's motion for appointment of counsel (dkt. no.
17 27) is denied.

18 It is further ordered that a certificate of appealability is denied, as jurists of reason
19 would not find the district court's dismissal of the petition as untimely to be incorrect or
20 debatable, for the reasons discussed herein.

21 The Clerk of Court shall enter final judgment accordingly, in favor of respondents
22 and against petitioner, dismissing this action with prejudice.

23 Dated this 24th day of February 2014.

24 
25 _____
26 MIRANDA M. DU
27 UNITED STATES DISTRICT JUDGE

28 ¹See, e.g., dkt. no. 17, Ex. 21, at 4-6 (extensively acknowledging both guilt and prior criminal record at sentencing in seeking lenience).